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JAMES R BROWN

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 505

A. L. WIRIN,

Petitioner,

vs.

HAROLD J. OSTLY, as County Clerk of the County of Los Angeles, State of California.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California (Second Appellate District, Division Two).

A. L. WIRIN,
257 South Spring Street,
Los Angeles 12, California,
In Pro. Per.

FRED OKRAND,

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In The

Supreme Court of the United States

October Term, 1961

No. .....

A. L. Wirin,

Petitioner,

vs.

Harold J. Ostly, as County Clerk of the County of Los Angeles, State of California.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California (Second Appellate District, Division Two).

Petitioner, A. L. Wirin, respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California adjudging that the non-disloyalty oath of Article XX, Section 3 of the California Constitution, as applied to petitioner, an applicant for the position of Notary Public, is constitutional and not violative of the First and Fourteenth Amendments to the United States Constitution.

Opinions Below.

The trial court rendered no written opinion.

The opinion of the court below [R. .....][1] is reported at 191 A. C. A. 746, 13 Cal. Rptr. 31. It is appended hereto as Appendix "A".

The judgment of the court below, in accordance with its practice, is the last phrase of its opinion [R. .....: Appx. A, p. 5].

". . . judgment is affirmed."

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is May 2, 1961 [R. ....: Appx. A, p. 1].

2. No rehearing was requested in the court below. Timely filed petition for hearing in the California Supreme Court was denied without opinion on June 21, 1961 [R. .....]. Under California procedure, the District Court of Appeal is, therefore, the highest state court in which a decision in this case could be had (*Rochin v. California*, 342 U. S. 165, 167; Cal. Const. Art. VI, §§4, 4(c); Rules 28 and 29, Rules on Appeal for the Supreme Court and the District Courts of Appeal of the State of California [36 Cal. 2d 24-25]). Time for filing petition for writ of certiorari was extended on September 11, 1961 by Mr. Chief Justice Warren to and including October 19, 1961.

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[1]The record being certified to this Court consists of the Clerk's Transcript of the proceedings in the trial court [C. T.], the Reporter's Transcript in the Trial Court [R. T.], the Opinion (including the Judgment) of the Court below and the Order of the California Supreme Court denying hearing.

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 1257(3) and 2101(c) and Rule 22(3) of this Court.

Question Presented for Review.

Is the non-disloyalty oath requirement of California Constitution Article XX, Section 3 unconstitutional under the due process clause of the Fourteenth Amendment as violative of the guarantees of freedom of speech, conscience, religion and thought and of the right of privacy of opinion, as applied to an otherwise qualified applicant for the office of notary public who refuses to take the oath as a condition of being a notary public?

Constitutional Provisions and Statute Involved.

First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article XX, Section 3 of the California Constitution:

"Members of the Legislature, and all public officers and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation:

"'I, . . . do solemnly swear (or affirm)that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"'And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or other-

wise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

.....

"(If no affiliations, write in the words 'No Exceptions')
and that during such time as I hold the office of (name of office)
..... I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means.'

"And no other oath, declaration, or test, shall be required as a qualification for any public office or employment.

" 'Public officer and employee' includes every officer and employee of the State, including the University of California, every county, city, city and county, district, and authority, including any department, division, bureau, board, commission, agency, or instrumentality of any of the foregoing."

Statement of the Case.

Facts.

Petitioner possesses all the qualifications for being a notary public in California [C. T. 32].[2] Pursuant to his application and payment of the required fee, petitioner was appointed and commissioned a notary public of the State of California for the County of Los Angeles by the Governor of the State [C. T. 32-33]. At the same time that the Secretary of State of California forwarded to petitioner the commission, he also forwarded to petitioner an oath, in the form of Article XX, §3 of the California Constitution, to be taken before the respondent County Clerk of Los Angeles County [C. T. 33]. Thereupon petitioner presented to respondent his notary bond in the amount and form required by law together with the required fee for the recording of the bond [C. T. 33]. Petitioner was and is ready and willing to take the oath of allegiance portion of the oath [C. T. 34-35][3] but refused, as a con-

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[2]Under Section 8301 of the California Government Code, the qualifications for being a notary public are: (1) Citizenship of the United States and of California, (2) Age of at least 21 years, (3) residence, principal place of business or employment in the County for at least 12 months, (4) good moral character.

[3]I, ... , do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter."

dition to his being permitted to perform the duties of a notary public, to take the non-disloyalty portion of the oath [C. T. 33-34].[4]

Respondent refused to permit petitioner to take the oath other than in the complete form set out in Article XX, §3 of the California Constitution [C. T. 35]. Without the oath and bond being filed with the County Clerk, it is a misdeameanor to exercise the functions of notary public [C. T. 14].

This suit was thereupon brought for a declaration that the non-disloyalty portion of the oath are, as applied to petitioner, unconstitutional and for a declaration that petitioner is entitled to qualify as a notary public upon his taking the remaining, or oath of allegiance, portion of the oath [C. T. 10].

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[4] "And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

.....

(If no affiliations, write in the words 'No Exception')

and that during such time as I hold the office of .....

..... I will not advocate nor

(name of office)

become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means."

This oath of disclaimer is commonly known in California as the Levering Oath [C. T. 9, 1].

The trial court held the oath to be valid and gave judgment to respondent [C. T. 39]. The court below affirmed [R. .....; Appx. A, p. 5].

There is no dispute as to the facts heretofore set forth. The sole factual issue at the trial was whether petitioner was unable to take the disputed oath as a matter of personal conscience and religious belief [R. T. 2; C. T. 8-9]. Because, in response to questions put to him by the trial judge for the purpose of testing weight and credibility [R. T. 14, 15], petitioner did answer in court questions covering some of the matters called for in the Levering Oath, the trial court found [C. T. 31] that it was not true that petitioner was unable or unwilling because of personal conscience or religious belief or because of his membership in the First Unitarian Church of Los Angeles to take the Levering Oath, the court adding a factor not present in the case: "under any and all circumstances." [C. T. 35]. In explaining his finding on this point, the court said [R. T. 22]: "I cannot draw a distinction between testifying orally in open court and filing the same thing in written form with the County Clerk."

How the Federal Question Was Raised.

A. In the Trial Court.

In his complaint, petitioner alleged [C. T. 9]:

> "The requirement by the defendants of the plaintiff that he subscribe to said Levering Oath, as a condition prior to the certification aforesaid by said defendant Ostly, and as a condition prior to the plaintiff's exercising any of the functions of a notary public, is beyond the authority of the de-

fendants and each of them, in that said Article XX, Section 3 of the California Constitution is unconstitutional as applied to plaintiff in the following respects and particulars:

"It abridges freedom of conscience, freedom of religion, freedom of thought, and the plaintiff's right of privacy of opinion, without due process of law, in violation of the First and Fourteenth Amendments to the Constitution of the United States."

The trial court ruled against this contention and held the oath to be valid and constitutional [C. T. 36].

B. In the Court Below.

In his briefs in the court below, petitioner argued the same issue, the court below putting the question before it this way [R. .....; Appx. A, p. 3]:

"The issue here presented to this court is whether the respondent county clerk may require a candidate for the office of notary public to take the oath prescribed in Article XX, Section 3 of the Constitution of this State, or whether said oath unconstitutionally abridges freedom of speech, freedom of conscience, freedom of religion, freedom of thought, the right of privacy of opinion, without due process, in violation of the First and Fourteenth Amendments to the Constitution of the United States."

By its affirmance [R. .....; Appx. A, p. 5], the court ruled the oath not unconstitutional.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

Hearing Should Be Granted so as to Settle the Important Federal Question, Left Unsettled Between Speiser v. Randall, 357 U. S. 513, and Konigsberg v. State Bar, 366 U. S. 36, as to How Far, if at All, the States May Go in Imposing a Burden of Proof to Establish Non-Advocacy Upon an Applicant for a Position.

In *Speiser v. Randall*, 357 U. S. 513, this Court held unconstitutional, as violative of the Due Process Clause of the Fourteenth Amendment, a state requirement of a non-advocacy oath[5] as a condition of obtaining tax exemption.

In *Konigsberg v. State Bar of California*, 366 U. S. 36, this Court held not violative of due process a state requirement that an applicant for the bar answer questions as to membership in the Communist Party. The Court, over a vigorous dissent which thought that the requirement in *Konigsberg* did, indeed, violate *Speiser*, held that *Speiser* was not applicable because in *Konigsberg* it did not appear that the applicant was being required to carry the burden of persuasion on the issue of advocacy of violent overthrow but only that the petitioner had failed to answer relevant questions.

In the case at bar, respondent in answer to petitioner's claim that the instant oath fell within *Speiser*

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[5]That the signer "does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means . . ."

because it placed on him the burden of proving that he did not advocate, has made clear that the applicant has at least some burden of proof. Thus, in oral argument before the court below (p. 11), his counsel said:

> ". . . But there is only one initial burden. It is slight. *It is on the applicant to prove non-advocacy.*" (Italics added.)

And in answer to the Petition for Hearing in the California Supreme Court, respondent stated (p. 9):[6]

> "Here, all that *the State requires* is *that petitioner*, by taking the constitutional oath, *establish* only *a prima facie case of non-advocacy* . . ." (Italics added.)

This, then, poses the question left undecided by *Konigsberg:* Can a State, consistent with due process, require an applicant to establish even a *prima facie* case of non-advocacy? Or does not the requirement of proving a *prima facie* case have all the vices spoken of in *Speiser* and require the applicant to "sustain the burden of proving the negative." (357 U. S. at 526).

To decide this important question, hearing should be granted. Whatever may be the true meaning of *Konigsberg*, this Court should not "go beyond it, by even a fraction of an inch." *(Silverman v. United States*, 365 U. S. 505, 512).

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[6] A copy of this document is being lodged with the Clerk of this Court for the convenience of the Court.

II.

The Decision of the Court Below Was Decided in a Way Probably Not in Accord With Applicable Decisions of This Court.

This Term this Court will hear argument in a "loyalty oath" case concerning a school teacher from Florida (*Cramp v. Board of Public Instruction of Orange County, Florida*, No. 72, Oct. Term, 1961).

The grant of hearing by the Court in that case demonstrates, despite cases which have upheld oaths[7] or similar measures for compelled disclosure,[8] that this Court is ever sensitive lest in this delicate field the asserted right of Government to compel disclosure of a citizen's beliefs, advocacies or affiliations rides roughshod over protected First Amendment rights.

Of course the *Cramp* case is not the first demonstration of this Court's concern in the field. Where constitutional bounds have been overstepped, the Court has not hesitated to so declare.[9] The instant case comes within the cases just cited and the decision of the court below is inconsistent with them.

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[7] *E.g. American Communications Association v. Douds*, 339 U. S. 382; *Osman v. Douds*, 339 U. S. 846; *Garner v. Board of Public Works*, 341 U. S. 716.

[8] *E.g. Adler v. Board of Education*, 342 U. S. 485; *In re Anastaplo*, 336 U. S. 82; *Beilan v. Board of Public Education*, 357 U. S. 399; *Konigsberg v. State Bar of California*, 366 U. S. 36; *Lerner v. Casey*, 357 U. S. 468; *Nelson v. County of Los Angeles*, 362 U. S. 1.

[9] *E.g. First Unitarian Church v. County of Los Angeles*, 357 U. S. 545; *Speiser v. Randall*, 357 U. S. 513; *Slochower v. Board of Education*, 350 U. S. 551; *Wieman v. Updegraff*, 344 U. S. 183; *Shelton v. Tucker*, 364 U. S. 479. *Cf. Girouard v. United States*, 328 U. S. 61; *Bates v. Little Rock*, 361 U. S. 516; *National Association for the Advancement of Colored People v. Alabama*, 357 U. S. 449; *Talley v. California*, 362 U. S. 60.

The reason which prompted this Court to hear the *Cramp* case are equally present here and for like reasons hearing should be granted. Indeed, the posture of the *Cramp* case would seem to suggest additional reason for granting certiorari here. In *Cramp* this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (29 U. S. Law Week 3358). There is no jurisdictional problem in the case at bar.

There is both a similarity and a dissimilarity between this case and *Cramp*. In *Cramp*, the appellant affirmatively had alleged in his complaint the non-existence of the matters called for in the Florida oath.[10] Here petitioner had answered questions put to him by the trial judge concerning some of the matters called for in the California oath [R. T. 13, 14]. Because Cramp had so alleged in his complaint, the Florida Supreme Court held that he had no standing to sue (125 So. 2d 554). Because petitioner here had answered in court, the trial judge held [C. T. 35] that petitioner's refusal to take the oath before respondent could not have been based on religious grounds as he had alleged in his complaint [C. T. 8, 9] and to which he testified in court [R. T. 4, 5].[11] The trial court stated that had it thought petitioner's refusal was

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[10]Appellee's brief in *Cramp*, citing page 2 of the Record in that case.

[11]". . . There is there a quotation from the statement made by the First Unitarian Church of Los Angeles. Now I will refer to it.

"'The principles, moral and religious, of the First Unitarian Church of Los Angeles compel it, its members, officers and minister, as a matter of deepest conscience, belief and

based on religious grounds, he might have come to a different conclusion [*R. T. 22*]. The court below did not discuss this phase of the case. Nevertheless there remains in the case the intriguing question as to whether when one answers in court questions concerning which he has refused to answer in another context on religious grounds, the refusal of the latter cannot be said to be religious.[12] We submit that the conclusion does not follow from the premise.[13]

The function which respondent would not permit petitioner to pursue unless he took the complete expurgatory test oath was that of a Notary Public. That the State cannot compel an unconstitutional oath as a condition of performing such function was settled

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conviction, to deny power in the State to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs.'

"I subscribe to and believe in this principle of the First Unitarian Church of Los Angeles of which I am a member.

"Q. Is it because of your acceptance of this principle that you refused to subscribe to the oath that was presented to you when you applied for a commission as a notary public?

"A. This is one of the reasons; perhaps the principle reason; but I was prompted also by other reasons.

"Q. What are those other reasons?

"A. The other reasons are: That I feel that I am unable as a matter of conscience, matter of personal conscience and as a matter of personal belief to subscribe to that portion of the oath required of me by the County Counsel which has been commonly designated as the Levering Act Oath, which I consider to be a test oath as to non-disloyalty, and this is a matter of personal conscience and personal belief."

[12]*Cf. United States v. Miranti*, 253 F. 2d 135 (C. A. 2, 1958); *United States v. An Article of Drug Consisting of 17 Bottles, etc.*, 26 F. R. D. 4 (D. N.J. 1960); *Grunewald v. United States*, 353 U. S. 391, 421-422.

[13]*Cf. Shelton v. Tucker*, 364 U. S. 479 where appellant refused to file the affidavit but testified to the facts called for by it at the trial.

by a unanimous court this last term in *Torcaso v. Watkins*, 367 U. S. 488. So the fact that petitioner is an applicant for that office is no bar. But more pointedly: In California, notaries public have long been considered to be performing but ministerial functions (*Bank of Woodland v. Oberhaus*, 125 Cal. 320, 324 (1899)). And since the passage, in 1957, of Code of Civil Procedure 2015.5,[14] it can fairly be said that notaries public, who never were, nor are, employees of the State nor receive any compensation from it, occupy a minor role as a "public official". There has been no showing by respondent, nor even a contention, that there ever was, or that there is, any danger to the State *from the performance by* those against whom the oath is directed of the functions that a notary may do in California.[15] Therefore, there is "no substantial relevant correlation between the governmental interest asserted and the State's effort to compel disclosure" (*Shelton v. Tucker*, 364 U. S. 479, 485) nor

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[14]"Whenever, under any law of this State or under any rule, regulation, order or requirement made pursuant to law, any matter is required or permitted to be evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official *other than a notary public*), such matter may with like force and effect be evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person stating the date and place of execution, and which is subscribed by him and certified or declared by him to be true 'under penalty of perjury,' which certification or declaration may be in substantially the following form:

"I certify (or declare) under penalty of perjury that the foregoing is true and correct. (Added Stats. 1957, c. 1612 p. 2959, § 1.)" (Italics added.)

[15]The duties of a notary public, as modified as a practical matter by Code of Civil Procedure 2015.5, are set out in California Government Code 8205.

is there "an evil shown to be grave." (*Speiser v. Randall*, 357 U. S. 513, 527). This case is not one "concerned (with) a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety." *(Ibid.)*

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. WIRIN,

In Pro. Per.

FRED OKRAND,

Of Counsel.

APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

A. L. Wirin, Plaintiff and Appellant, vs. Harold J. Ostly, as County Clerk of the County of Los Angeles, State of California, et al., Defendants. Harold J. Ostly, as County Clerk of the County of Los Angeles, Respondent. Civ. No. 24644.

Filed May 2, 1961.

Appeal from judgment of the Superior Court of Los Angeles County. Charles A. Loring, Judge. Affirmed.

For Appellant: A. L. Wirin, Fred Okrand, Abraham Gorenfeld, Richard W. Petherbridge.

Amici Curiae on behalf of Appellant: Rudolph Pacht, Albert M. Bendich.

For Respondent: Harold W. Kennedy, County Counsel; Ronald L. Schneider, Deputy County Counsel.

The plaintiff sought a declaratory judgment that he was entitled to hold the office of notary public without subscribing to certain portions of the oath set forth in Article XX, Section 3, of the Constitution of the State of California, and that defendant Harold J. Ostly, as County Clerk of the County of Los Angeles, was without legal authority to refuse to administer the oath in the modified form in which plaintiff was willing to take the oath or to refuse to transmit the certificate required by section 8213 of the Government Code. From a judgment for the defendant, this appeal is taken.

Appellant was willing to take that part of the oath which reads as follows:

"I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter."

The appellant refused to take that portion of the oath which reads as follows:

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation), I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows: .....

(if no exceptions

.....and that during

write in the words "No Exceptions")

such time as I hold the office of Notary Public I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the

overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means."

The issue here presented to this court is whether the respondent county clerk may require a candidate for the office of notary public to take the oath prescribed in Article XX, Section 3 of the Constitution of this State, or whether said oath unconstitutionally abridges freedom of speech, freedom of conscience, freedom of religion, freedom of thought, the right of privacy of opinion, without due process, in violation of the First and Fourteenth Amendments to the Constitution of the United States.

At the trial of the action, appellant testified that he could not subscribe to the indicated portions of the oath because of his religious beliefs and the tenets of his church in regard to test oaths. The appellant in court testified that he does not advocate nor is he ". . . a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means . . .". He further testified that within the five years immediately preceding his testimony in court he had not been a member of any party or organization that advocated the overthrow of either of the above governments by force or violence, and further testified that he would not, during his term of office, advocate the overthrow of either government by force or violence.

To support his contentions, appellant cites many authorities, the United States Constitution, decisions of federal courts, the California Constitution, many California statutes, codes and court decisions, several texts,

transcripts of hearings before subcommittees of the Federal Congress and of the California Legislature, and excerpts from magazines and newspapers, including campaign speeches by candidates for the presidency.

Despite this wealth of authorities, it would appear that the constitutionality of the particular oath here questioned was upheld by the Supreme Court of this state in Pockman v. Leonard, 39 Cal. 2d 676. The only difference we can discern is that in the Pockman case the oath objected to was, at that time, contained in a Government Code section and was in addition to the then provided constitutional oath of office. The fact that this oath has since been adopted into the state constitution would seem in no way to detract from the validity and effect of the holding in the Pockman case.

Certain arguments by appellant to the effect that a notary public is an unimportant type of public officer were answered by the Pockman case at pages 683-684 where it is said, in treating with the there respondent's suggestion that public officers be divided into two classes, one of which should be designated "inferior officers": "We are unable to find any place where a line can reasonably be drawn so as to place some positions within and others outside the constitutional prohibition, and, in our opinion, there is no justification for excluding any public servants from its protection. The prohibition should therefore be read as applying to every state and local officer and employee. This construction is in accord with the basic purpose of safeguarding the public and its servants by forbidding oaths and declarations regarding matters that bear no reasonable relationship to governmental service and par-

ticularly those that involve political and religious beliefs. Persons in the lower levels of government are just as much entitled to this protection as those in higher positions. And other interpretation of the prohibition would lead to the absurd result that the relatively few persons who occupy the most important positions could be required to take only the constitutional oath, while those who work under them and execute their orders could be compelled to submit to various other oaths, declarations and tests." (Page 684.)

The Pockman case, at page 686, would seem to dispose of appellant's contention that the oath required here is a test of religious opinion where in dealing with such oath it is said that it ". . . is obviously not a test of religious opinion. Neither does it compel disavowal of any political belief or membership in any named political party. While it requires the affiant to swear that he does not advocate, or belong to any party or organization which advocates overthrow of the government by force or violence or other unlawful means, these may not properly be called matters of political opinion. The word 'political' imports orderly conduct of government, not revolution, and the term is not applicable to advocacy of a belief in overthrow of the government by force or violence."

In view of the concise holding in Pockman v. Leonard, supra, judgment is affirmed.

McMurray, *J. Pro tem.*

We concur:

Fox, *P.J.*

Ashburn, *J.*

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IN THE

Supreme Court of the United States

October Term, 1961

No. 505

A. L. WIRIN,

Petitioner,

vs.

HAROLD J. OSTLY, as County Clerk of the County of Los Angeles, State of California,

Respondent.

On Petition For Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Two

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinion Below

The opinion of the District Court of Appeal is reported in 191 Adv. Cal. App. 746, 13 Cal. Rptr. 31 (Pet. for Writ, Appx. "A").

Question Presented

Whether the State of California can require, as a condition of holding a government office such as that of a notary public, the taking of the oath prescribed in Article XX, Section 3, of the Constitution of the State of California.

Constitutional Provisions and Statutes Involved

In addition to the Federal and State Constitutional provisions set forth in the Petition for Writ (Pet. for Writ, pp. 3-5) certain provisions of the Government Code of the State of California, relating to the office of notary public, are also applicable and are here set forth in relevant part.

Section 8200 provides:

> "Section 8200. Appointment and commission: number; jurisdiction; fees.
>
> The Governor may appoint and commission notaries public in such number as he deems necessary for the public convenience. Notaries public may act as such notaries in any part of this State, and they shall receive for their services such fees as are provided by law."

Section 8201 provides:

> "Section 8201. Qualifications.
>
> Every person appointed as notary public shall:
>
> (a) Be at the time of appointment a citizen of the United States and of this State, except as otherwise provided in Section 8203.1 of this chapter.
>
> (b) Have resided in this State for 12 consecutive months immediately preceding his appointment, except as otherwise provided in Section 8203.1.
>
> (c) Be not less than 21 years of age.
>
> (d) Be of good moral character."

Section 8205 provides:

"Section 8205. Duties.

It is the duty of a notary public:

(a) When requested, to demand acceptance and payment of foreign and inland bills of exchange, or promissory notes, to protest them for nonacceptance and nonpayment, and to exercise such other powers and duties as by the law of nations and according to commercial usages, or by the laws of any other state, government, or country, may be performed by notaries.

(b) To take the acknowledgment or proof of powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing executed by any person, and to give a certificate of such proof or acknowledgment, endorsed on or attached to the instrument. Such certificate shall be signed by him in his own handwriting and under his signature his name shall be typed or legibly printed.

(c) To take depositions and affidavits, and administer oaths and affirmations, in all matters incident to the duties of the office, or to be used before any court, judge, officer, or board in this State. Any deposition, affidavit, oath or affirmation shall be signed by him in his own handwriting and under his signature his name shall be typed or legibly printed."

Section 8206 provides:

"Section 8206. Records; certified copies.

A notary public shall keep a record of all official acts done by him and a record of the parties to, date, and character of every instrument acknowledged or proved before him.

When requested, and upon payment of the fee therefor, a notary public shall make and give a certified copy of any record in his office."

Section 8212 in relevant part provides:

"Section 8212. Bond, amount, approval.

Every person appointed a notary public shall execute an official bond in the sum of five thousand dollars ($5,000). . . ."

Section 8213 provides:

"Section 8213. Bond, filing, recording, fee; oath, filing; disposition of bond; record as evidence.

Within 20 days from the beginning of the term prescribed in his commission, every person appointed a notary public shall file his official bond, and take, subscribe, and file his oath of office in the office of the county clerk of the county within which he maintains his principal place of business. Upon filing the oath and bond, the county clerk shall forthwith transmit to the Secretary of State his certificate setting forth the fact of such filing and containing a copy of the official oath, signed by the notary with his own proper signature, and shall forthwith deliver the bond to the county recorder for recording.

If he transfers his principal place of business from one county to another he shall, within 20 days of such transfer, file a new oath of office and bond, or a duplicate of the original bond, with the county clerk of the county to which he transfers.

A recording fee of two dollars ($2) shall be paid by the person appointed a notary public. Said fee may be paid to the county clerk who shall transmit it to the county recorder.

The county recorder shall record the bond and return it to the county clerk who shall keep the bond for one year following the expiration of the term of the commission for which the bond was issued after which said bond may be disposed of. Such disposition shall not affect the time for commencement of actions on the bond. A certified copy of the record of the official bond with all affidavits, acknowledgments, endorsements and attachments, may be read in evidence with like effect as the original thereof, without further proof."

Section 8214 provides:

"Section 8214. Misconduct or neglect.

For the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the persons injured thereby for all the damages sustained."

STATEMENT OF THE CASE

Petitioner, after applying for and receiving an appointment and commission as a notary public (C.T. 32-33), thereafter presented his notary bond and fee to respondent as required by law. (C.T. 33). Section 8213 of the Government Code of California provides, in part, that every person appointed a notary public shall file his official bond, and take, subscribe, and file his oath of office in the office of the county clerk. That section further provides, in part, that upon filing of the oath and bond, the county clerk shall forthwith transmit to the Secretary of State his certificate setting forth the fact of such filing and containing a copy of the official oath, signed by the notary with his own proper signature and shall forthwith deliver the bond to the county recorder for recording.

At the time he presented his bond and fee to respondent, petitioner refused to subscribe in toto to the oath of office as required by Article XX, Section 3 of the State Constitution. (C.T. 33).

Petitioner was willing to subscribe to the first portion of the oath which reads as follows:

> "I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take

this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter." (C.T. 34-35)

However, petitioner refused to subscribe to the remaining portion of the oath:

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

.....

(If no affiliations, write in the words "No Exceptions") and that during such time as I hold the office of .....

(name of office)

I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means." (C.T. 33-34)

Respondent refused to administer the modified oath to petitioner (C.T. 35) who thereupon filed the present action for a declaration of his rights.

At the trial, petitioner testified that his refusal to take the excised portions of the oath of office was grounded on his membership and belief in the principles espoused by a local church (R.T. 3-5), his personal conscience and belief (R.T. 5) and his personal opinion as an attorney that the State had no legal right to require the taking of the oath. (R.T. 11-12).

However, he did answer questions directed to him by the trial court which encompassed these selfsame questions he had heretofore refused to answer. (R.T. 12-15).

The trial court refused to attach credibility to petitioner's professed contentions that his personal conscience, religious belief or membership in a local church prevented him from taking the completed oath of office. (R.T. 82, C.T. 35). The trial court further determined that the oath of office is not a religious test, nor does it compel a disavowal of political belief or opinion or of membership in any named political party. (R.T. 82-83, C.T. 36).

The District Court of Appeal in an unanimous decision affirmed the trial court, holding that the case of *Pockman v. Leonard*, 39 Cal. 2d 676, (app. dism. for want of a substantial federal question, 345 U.S. 962), had already upheld the constitutionality of this particu-

lar oath and had already determined that this oath of office was not a religious or political test. (Pet. for Writ, Appx. "A," pp. 4-5).

The Supreme Court of California denied a petition for hearing on June 21, 1961. (R.).

I.

THE DECISION OF THE CALIFORNIA COURT IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Petitioner would have this Court accept this case because it falls somewhere in between *Speiser v. Randall*, 357 U.S. 513 and *Konigsberg v. State Bar*, 366 U.S. 36. (Pet. for Writ, Point I).

Respondent contends that far from lying between these two cases, it comes within the ambit of neither. No amount of dialectics can obscure the central fact of this case that the non-political oath of office required of potential state officers by the State of California does not operate to shift the ultimate burden of persuasion of non-advocacy of violent overthrow of government. To the contrary, the oath of office merely serves to establish a prima facie case of such non-advocacy.

In *Speiser*, supra, 357 U.S. 513, this Court struck down a State statute that required that an applicant for a tax exemption execute a statement denying advocacy of unlawful overthrow of the government.

This Court held that the taking of the oath was only the first of several distinct steps in the probative process throughout which the taxpayer had to bear the laboring oar in showing his qualification for a tax exemption. Because the continuing affirmative burden of proof—in effect the ultimate burden—was placed on the taxpayer, the requirement of the taking of the first step, the filing of the oath, was held to be violative of due process.

In *Konigsberg*, supra, 366 U.S. 36, this Court upheld a requirement of the State Bar of California that applicants for the bar answer questions relating to Communist Party membership. This Court pointed out that while an applicant had to establish a prima facie case of non-advocacy[1], there was no indication that the applicant had the ultimate burden of persuasion on that issue.

As pointed out by the Court below, the oath of office required of petitioner is neither a religious nor political test. (Pet. for Writ, Appx. "A," p. 5). This would seem to dispose of petitioner's suggestion as to the applicability of the *Speiser* rationale to this case since this Court has explicitly limited that case to situations where there is a showing of an intent to penalize political beliefs. (*Speiser v. Randall*, supra, 357 U.S. 513 at 527; *Konigsberg v. State Bar*, supra, 366 U.S. 36 at

[1]It is to be noted here that no attack is made by petitioner on the requirement of Section 8201(d) of the Government Code of California that potential notaries public have the burden of establishing a prima facie case of "good moral character." Compare this requirement with the similar burden of proof required of State Bar applicants. (*Konigsberg v. State Bar*, 366 U.S. 1[illegible]

54). There is not a scintilla of evidence in the record here that the oath of office was used by the State as a device to probe into petitioner's political beliefs. In point of fact, the California courts have already held this oath to be non-political in character. (cf. *Pockman v. Leonard*, 39 Cal. 2d 676 at 686).

Konigsberg is likewise inapplicable here since the oath of office does not place upon petitioner the ultimate burden of persuasion on the issue of non-advocacy of violent overthrow. All that the State requires of petitioner as an applicant for State office is the establishment of a prima facie case that he does not advocate unlawful overthrow of the government he seeks to represent.[2] Once this prima facie case is established, no further or ultimate burden of persuasion is required of petitioner. Respondent, who has the duty of administering the oath of office may not thereafter reject the completed oath and subject petitioner to further examination. The oath, in itself, is conclusive of the facts attested to so far as the right to office is concerned.[3]

As this Court points out in *Konigsberg*, requiring a defendant to testify in a civil proceeding or submit

[2]The validity of the interest of the State that potential officeholders disavow advocacy of violent overthrow of the government is shown in part by the fact that such advocacy is a disqualification for the holding of public office. See: Article XX, Section 19 of the Constitution of the State of California.

[3]Compare this with the situation facing the applicant for a tax exemption in *Speiser v. Randall*, 357 U.S. 513, who even if he completed the non-advocacy statement was still subject to further inquiry by additional judicial and administrative proceedings since the statement did not have an independent significance of its own.

to discovery has never been thought to shift the burden of proof to him. (*Konigsberg v. State Bar*, supra, 366 U.S. 36 at 55). So here, the mere fact that petitioner is required to make out a prima facie case of qualification for the office of notary public is beside the point. The point is that the filing of the oath itself is the final step in the process by which the State seeks to determine the fitness of applicants for State office.[4]

Therefore, it is apparent that neither *Speiser* nor *Konigsberg* are applicable here since the oath in question is non-political and places merely a prima facie, as opposed to an ultimate, burden of proof on the issue of non-advocacy on petitioner.

II.

THE STATE OF CALIFORNIA HAS THE RIGHT TO REQUIRE THAT ALL POTENTIAL STATE OFFICIALS DISAVOW UNLAWFUL OVERTHROW OF THE GOVERNMENT AS A CONDITION TO ENTERING THAT GOVERNMENT.

It is clear that the State has the right to ask the type of questions posed by the Constitutional oath of office. (cf. *Garner v. Board of Public Works*, 341 U.S. 716; *Gerende v. Board of Supervisors*, 341 U.S. 56; *Adler v. Board of Education*, 342 U.S. 485; and *American Communications Assn. v. Douds*, 339 U.S. 382).

[4]The initial steps are of course the establishment of a prima facie case of meeting the statutory qualifications for office, including that of good moral character, and the filing of a bond. (Sections 8201 et seq. of the Government Code)

Indeed, it is difficult to argue that a belief firm enough to become advocacy in the use of unlawful means of overthrow of government is an unimportant consideration in determining the fitness of those who seek public office. Yet, petitioner appears to be making that argument. He would limit the ambit of permissible inquiry to those officials who in some unknown manner are determined to be important rather than "minor." (Pet. for Writ, p. 15).

Respondent contends that this limitation is impractical and unrealistic. The Court below indicated that they were unable to draw a line so as to place some State officers within and others without the constitutional oath requirement. (Pet. for Writ, Appx. "A," p. 4). This Court should not now attempt to do so. In *Lerner v. Casey*, 357 U.S. 468, this Court upheld the right of the State to inquire into the background of a subway conductor. Certainly a notary public as an officer of the State with substantial powers in the commercial and legal fields, stands higher in the hierarchy of government than does a subway conductor. If a subway conductor can be required to answer questions regarding subversive advocacy, it would seem that, a fortori, petitioner as a potential state officer can be so required.

CONCLUSION

It is submitted that petitioner was properly required to take the complete oath of office required by Article XX, Section 3 of the Constitution of the State of California as a condition of his becoming a notary public. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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